Montana Law Review

Volume 31
Issue 2 *Spring 1970*

Article 5

1-1-1970

Common Law Liability of Liquor Vendors

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COMMON LAW LIABILITY OF LIQUOR VENDORS

I. INTRODUCTION

Recently, District Judge Jameson of the United States District Court, District of Montana, decided the case of *Deeds v. United States.*[1] The case presented to the court the question: "[I]s there a right of action under Montana law against the person selling or furnishing intoxicating liquor to a minor or intoxicated person in favor of a person injured by the intoxicated person as a consequence of his intoxication?"[2] On the facts presented by *Deeds,* Judge Jameson answered the question in the affirmative, concluding that the plaintiff was entitled to recover damages from the vendor of the intoxicants.

The successful plaintiff, Sandra Deeds, had been injured in an automobile accident. She had been a passenger in an automobile driven by Gerald Tanberg, who prior to the accident had been served intoxicating liquors by employees of the defendant United States. The serving was violative of Montana law[3] in that Tanberg was a minor and sales were made or liquor was given to him after he became intoxicated. The court concluded that this violation of law constituted negligence,[4] and that it was a proximate cause of the accident and resulting injuries to the plaintiff.[5]

To the extent that the holding of *Deeds* represents Montana law, Montana is aligned with a minority of jurisdictions sustaining a liquor vendor's common law[6] liability to a third person injured by the vendor's patron. But to characterize the *Deeds* holding as the minority approach, is to stop short. *Deeds* is representative of a handful of recently decided cases that seem to evince a nascent trend reversing the present

[1]Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969) [hereinafter cited as Deeds].

[2]*Id.* at 354.

[3]R.C.M.1947 § 4-413. This section reads in pertinent part:

> No licensee or his or her employee or employees, nor any other person, shall sell, deliver, or give away or cause or permit to be sold, delivered or given away any liquor, beer or wine to:
>
> 1. Any person under the age of twenty-one (21) years.
> 2. Any intoxicated person or any person actually, apparently or obviously intoxicated.

[4]Deeds at 359.

[5]*Id.* at 361.

[6]It should be noted that although the common law rule generally denies recovery against the vendor, many states have enacted statutes granting a right of action, to persons injured by an intoxicated person, against the person selling the liquor which caused the intoxication. These statutes, usually denominated as either a Civil Damage Act or a Dram Shop Act, are not in any sense common law negligence actions but rather they confer new, separate and distinct rights of action. 45 AM. JUR 2d *Intoxicating Liquors* § 561 (1969). Ogilvie lists twenty-one states having dram shop acts in 1958. Ogilvie, *History and Appraisal of the Illinois Dram Shop Act,* 1958 U. Ill. L.F. 175. A somewhat perfunctory research would indicate that the number has remained unchanged.

majority rule insulating the vendor. The compass of this Note shall include a statement of the majority common law rule, a recapitulation of the cases seeming to establish a trend allowing recovery, and a discussion of *Deeds*.

II. GENERAL COMMON LAW RULE DENYING CAUSE OF ACTION

At common law the majority rule is that a vendor of intoxicating liquor is not liable to a third person for injury or damage sustained by the third person resulting from the intoxication of the vendor's patron,[7] nor is the vendor liable to the intoxicated patron who has, because of his intoxication, injured himself.[8] Simply stated the common law rule is that it is not a tort to sell or give intoxicating liquor to the ordinary able-bodied man.[9] In protecting the liquor vendor many courts go beyond this "able-bodied" or "competent man" statement of the rule. In the California case of *Hitson v. Dwyer*,[10] for example, plaintiff patron fell from a stool in defendant's bar after defendant had served, to the obviously intoxicated plaintiff, liquor in violation of statute which prohibited the selling, furnishing, or giving of any alcoholic beverage to any obviously intoxicated person. The court found for the defendant, reasoning that it was not the sale of the liquor, but rather the consumption of it which was the proximate cause of the plaintiff's injuries.

The rationale expressed in *Hitson* is the one usually given for the holding of non-liability in these cases; that is, the wrongful sale of the liquor is not the proximate cause of the injury, but rather it is

[7]*See generally* Annot., 75 A.L.R.2d 833 (1961), for a discussion of the common law right of action for damages sustained by a third party plaintiff in consequence of sale or gift of intoxicating liquor or habit forming drugs to another. Cases holding, recognizing, or illustrating the majority rule of the vendor's non-liability include: Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Fleckner v. Dionne, 94 Cal. App.2d 246, 210 P.2d 530 (1949); Noonan v. Galick, 19 Conn. Supp. 308, 112 A.2d 892 (1955); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329 (1943); Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Stringer v. Calmes, 167 Kan. 278, 205 P.2d 921 (1949); State for the use of Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 52 A.L.R.2d 875 (1955); Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746 (1940).

[8]*See generally* Annot., 54 A.L.R.2d 1152 (1957), for the common law liability of persons furnishing intoxicating liquor for injury or death of the consumer. Although *Deeds* does not raise the issue of a consumer's right to a cause of action against the vendor, the issue has sufficient connection to the one presented by *Deeds* that it will also be discussed under part III of this Note, THE TREND TOWARD AVAILABILITY OF REMEDY AGAINST THE VENDOR.

[9]Kingen v. Weyant, 148 Cal. App.2d 656, 307 P.2d 369 (1957); Howlett v. Doglio, 402 Ill. 311, 83 N.W.2d 708 (1949); Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947).

[10]Hitson v. Dwyer, 61 Cal. App.2d 803, 143 P.2d 952 (1943).

the voluntary consumption which is the proximate cause.[11] Some courts go further finding the sale even more remote. In *Collier v. Stamatis*,[12] for example, the defendant tavern keeper sold a drink of highly intoxicating liquor to a child fifteen years of age. The child became intoxicated and was held in detention by officers of the law as a juvenile delinquent. The child's mother was deprived of her daughter's services, and her prayer was for both compensatory and punitive damages. The court found that the sale was clearly unlawful and therefore negligence per se, yet it held that the complaint did not state a cause of action. It held as it did reasoning not only was the sale not the proximate cause of the injury, but it was not even the proximate cause of the child's intoxication.

> [I]n the imbibing of alcoholic drink the proximate cause of the resultant intoxication is the voluntary, independent, uncoerced, uninvited self-indulgence of him who knowing the difference between right and wrong and the injurious effects apt to follow yet holds the cup to his own lips and drinks.[13]

Where the patron himself is the plaintiff, the vendor usually has the defense of contributory negligence.[14] Furthermore, the contributory negligence of the decedent bars recovery by his heirs or next of kin in a wrongful death action.[15]

At least one court[16] has expressed the view that having once had a Dram Shop Act which provided for a cause of action against the vendor, upon repeal of that Act, it would fly in the face of logic to judicially accord a cause of action against the liquor vendor.[17]

[11] *Id.*, Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329 (1943); Fleckner v. Dionne, 94 Cal. App.2d 246, 210 P.2d 530 (1949); Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450, 54 A.L.R.2d 1137 (1955); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967).

[12] 63 Ariz. 285, 162 P.2d 125 (1945).

[13] *Id.* at 162 P.2d 128.

[14] Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450, 54 A.L.R.2d 1137 (1955); Noonan v. Galick, 19 Conn. Supp. 308, 112 A.2d 892 (1955); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965). *Contra*, Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).

[15] *Contra*, Soronen v. Olde Milford Inn, 46 N.J. 582, 218 A.2d 630 (1966) (contributory negligence of deceased not a bar in suit by widow for wrongful death where widow not charged with contributory negligence). *See* the discussion of *Soronen* in the text accompanying notes 44 and 74, *infra*.

[16] Meade v. Freeman, 93 Idaho 389, 462 P.2d 54, 58 (1969) (by implication). But where Pennsylvania formerly had a Dram Shop Act which it had repealed, the Pennsylvania court held the plaintiff *did* state a cause of action at common law where the complaint alleged the vendor had unlawfully sold intoxicating liquor to the visibly intoxicated patron plaintiff, who was subsequently injured in an attack by another patron. Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958). *Schelin* is discussed in the text accompanying note 25, *infra*. *See also Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1, 75 A.L.R.2d 821 (1959) which is discussed in the text accompanying notes 28-32, *infra*.

[17] It can be argued that such a position is without valid support. In the absence of evidence to the contrary, it might well be that the Act was repealed because the remedy it provided, in the minds of the majority of the legislators, was not comprehensive enough; or perhaps it, coupled with a statute permitting recovery for wrongful death, permitted a double recovery in some instances and the legislators wanted to cure this defect . . . . The point is, there could be any number of reasons for the repeal of the Act. Without evidence as to why an Act is repealed, it is anomolous to hold in effect that a legislature can legislate by repealing legislation!

The cases are legion in denying a cause of action at common law against a vendor of intoxicating liquors. However, there were a few cases[18] widely scattered spatially and chronologically, which recognized a cause of action against the vendor. In retrospect it may be said that they inaugurated the assault upon the rule. That assault commenced in earnest in 1958. Since that time there have been numerous decisions rendered which hold in opposition to the majority rule.

III. THE TREND TOWARD AVAILABILITY OF REMEDY AGAINST THE VENDOR

A. THE PRE-1958 CASES

Notwithstanding the general rule denying recovery, several courts early recognized exceptional circumstances in which a vendor might be liable. A re-occurring situation where recovery was treated more favorably was where the patron was in such a state as to be helpless to protect himself from his own weaknesses. In *McCue v. Klein*,[19] the defendant saloon keepers had made a wager among themselves as to whether the deceased could drink three pints of whiskey in quick succession. They knew the patron to be an habitual drunkard, and he was intoxicated at the time. For his feat the patron was to be paid a dollar. After having consumed two pints of whiskey, a bystander urged the defendants not to furnish the patron any more whiskey. This urging was ignored; the patron imbibed the third pint with immediately fatal results. The defendants were held liable to the deceased patron's widow. In *Bissell v. Starzinger*,[20] and in *Ibach v. Jackson*,[21] the courts expressed similar concern, opining that a vendor may be liable in circumstances where he has furnished intoxicating liquor to an "irresponsible" patron.[22]

In 1850 the Missouri court found the defendant innkeeper liable for damages to a slave owner because the defendant had permitted a slave to become intoxicated, resulting in the slave's death.[23] And in 1896 the Tennessee court held that the defendant was liable to the wife of the deceased where the defendant had repeatedly sold liquor to the deceased

[18]Skinner v. Hughes, 13 Mo. 440 (1850); McCue v. Klein, 60 Tex. 168 (1883); Riden v. Grimm Bros., 97 Tenn. 220, 36 S.W. 1097 (1896); Bissell v. Starzinger, 112 Iowa 266, 83 N.W. 1065 (1900) (by implication); Ibach v. Jackson, 148 Ore. 92, 35 P.2d 672 (1934).

[19]60 Tex. 168 (1883).

[20]112 Iowa 266, 83 N.W. 1065 (1900).

[21]148 Ore. 92, 35 P.2d 672 (1934).

[22]More recently, the principle of a duty owing to the irresponsible patron expressed in the early cases of *McCue*, *Bissell*, and *Ibach*, has found further expression. *See* Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940) (defendant held liable having sold liquor to a known habitual drunkard); Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956) (defendant vendor knew vendee would drink quart of liquor without stopping); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 75 A.L.R.2d 821 (1959) (defendant sold to a visibly intoxicated minor); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964) (defendant vendor sold to a visibly intoxicated vendee).

[23]Skinner v. Hughes, 13 Mo. 440 (1850).

over the wife's written instructions to the contrary.[24] But aside from a handful of exceptional cases, there was no common law cause of action against the vendor of liquor for the sale of intoxicants to a patron who was injured as a result of his intoxication, nor was there liability to an innocent third person who was injured by the intoxicated patron.

B. THE RECENT CASES ESTABLISHING A TREND TO REMEDY

Beginning in the year 1958, there has been decided a series of cases that has come to constitute a trend-setting exception to the traditional common law position denying recovery. Pennsylvania precipitated the trend with its landmark decision of *Schelin v. Goldberg*.[25] In *Schelin* the court held that an intoxicated patron of a bar who lost an eye in a scuffle with another patron, had a cause of action where the defendant had served him liquor in violation of a Pennsylvania statute which made it unlawful to sell liquor to any person visibly intoxicated. The court concluded that the statute was intended to protect vendees as part of the public, and that its violation was negligence per se.

In 1959 two leading decisions held for plaintiffs against liquor vendors. In *Waynick v. Chicago's Last Dept. Store*,[26] the court found Michigan common law to support plaintiff's cause of action where the complaint alleged that defendant tavern owners in Illinois had unlawfully sold intoxicating liquor to two drunken men who crossed into Michigan where they were involved in a tragic accident resulting in plaintiff's injuries. The court noted that both Illinois and Michigan had Dram Shop Acts which would ordinarily permit recovery, but neither of the Acts applied to the facts of the *Waynick* case. It was in that vacuum that the court purported to find a common law cause of action, even though the court found no Michigan precedent for its holding. It would have been an anomalous and harsh result had the court denied a cause of action to the very citizens the Acts were intended to protect where, because of the unique facts of the case, neither Act applied.[27]

The second of the important cases decided in 1959, and perhaps *the* leading minority decision, is the case of *Rappaport v. Nichols*.[28] The New Jersey court cited the *Schelin* and *Waynick* decisions with approval, and noted that these decisions are supportable by many analogous tort situations where liability is imposed upon a defendant whose negligence concurs with that of another tortfeasor to cause injury to an innocent

[24]Riden v. Grimm Bros., 97 Tenn. 220, 36 S.W. 1097 (1896).
[25]188 Pa. Super. 341, 146 A.2d 648 (1958). The court reached its decision permitting a common law cause of action notwithstanding the fact that an 1854 Pennsylvania Dram Shop Act had been repealed before the assault on the plaintiff. *See Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969), discussed *supra* in note 17, for a *contra* result where a Dram Shop Act had been earlier repealed.
[26]269 F.2d 322 (7th Cir. 1959), *cert. den.* 362 U.S. 903 (1960).
[27]Comment, *Civil Liability Under the Michigan Liquor Control Act*, 46 J. URBAN LAW 87, 90 (1968).
[28]31 N.J. 188, 156 A.2d 1, 75 A.L.R.2d 821 (1959).

third party.[29] Having concluded that New Jersey's repeal of her Dram Shop Act[30] left unimpaired the common law principles of tort, a unanimous court held for a plaintiff injured in an automobile collision in which the negligent minor and already intoxicated driver of the other vehicle had been served liquor by the defendants in violation of statute. The court determined that the statute prohibiting sales of liquor to minors and intoxicated persons was not to be narrowly construed as protecting minors and intoxicated persons alone, but rather it was intended for the protection of the public. Hence its violation might well constitute common law negligence.[31]

In concluding that the defendants' negligence might have been the proximate cause of the plaintiff's injuries, the court said:

> [A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries. . . . The fact that there were also intervening causes which were foreseeable or were normal incidents of the risk created would not relieve the tortfeasor of liability . . . [If] the defendant tavern keepers unlawfully and negligently sold alcoholic beverages to Nichols causing his intoxication, which in turn caused or contributed to his negligent operation of the motor vehicle at the time of the fatal accident, then a jury could reasonably find the plaintiff's injuries resulted in the ordinary course of events from the defendants' negligence and that such negligence was, in fact, a substantial factor in bringing them about. And a jury could reasonably find that . . . [vendee's acts were] a normal incident of the risk they created, or an event which they could reasonably have foreseen, and that consequently there was no effective breach in the chain of causation.[32]

Since the decision in *Rappaport,* there has been a steady erosion of the rule denying liability. Some jurisdictions have indicated that in the proper circumstances they will adopt the minority rule, and others

[29]The court discussed several cases where the defendants had unlawfully provided minors with firearms or ammunition, noting that when the minor negligently injured an innocent third party the minor's negligent act would not constitute a superseding intervening cause. Similarly in those cases where the operator of an automobile left the key in the ignition in violation of statute, a thief's stealing the vehicle and negligently injuring a third person, would not constitute a superseding intervening act. The party who initially violated the statute created the risk of injury to the innocent third party, and it was "fairer to hold him responsible for the harm than to deny a remedy to the innocent victim." 31 N.J. 188, 156 A.2d 1, 7, 75 A.L.R.2d 821, 828, 829 (1959). *See also* note 38, *infra.*

[30]N. J. SESSION LAWS, 1921, ch. 103, which was repealed by N. J. SESSION LAWS, 1934, ch. 32.

[31]PROSSER, HANDBOOK ON THE LAW OF TORTS, § 35 at 191 (3d ed. 1964), states:

> The standard of conduct required of a reasonable man may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate. [Citations omitted.]
>
> Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. *Id.,* n. 85 *quoting* Osborne v. McMasters, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889).

[32]Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 9, 75 A.L.R.2d 821, 831.

have explicitly done so. In 1962 the Colorado court dismissed a complaint where the tavern owner was alleged to have violated a statute forbidding the sale or gift of liquor to minors, intoxicated persons, or habitual drunkards.[33] The court held that the statute was penal and its violation could not be made the basis of negligence per se, but the court indicated that a complaint based on common law principles would state a good cause of action.[34]

In 1963 the Florida Supreme Court permitted a recovery by a parent for his son's death.[35] Where defendant violated a statute proscribing sale to minors, it was held to be negligence per se to sell whiskey to plaintiff's sixteen-year-old son where his age could readily have been ascertained and he was sitting in an automobile at the time of sale. In 1964 in the case of *Jardine v. Upper Darby Lodge No. 1973, Inc.*,[36] the Pennsylvania court granted recovery to a pedestrian plaintiff against defendant tavern which had served intoxicants to an inebriated patron who in his automobile subsequently collided with the plaintiff.[37] The same year a Tennessee appellate court stated that in some circumstances a sale of intoxicating liquor may constitute negligence, and the sale rather than the consumption may be the proximate cause of injury.[38] Thus the court indicated its acknowledgment of a cause of action at common law against a liquor vendor.

In 1965 a rash of decisions were rendered modifying and eroding the majority rule. Pennsylania permitted recovery to a patron who had been confined in a men's room after he had become intoxicated at defendant's establishment, where plaintiff crawled out a window and fell

[33]Hull v. Rund, 150 Colo. 425, 374 P.2d 351 (1962).

[34]*Id.* at 427-28, 374 P.2d at 352.

[35]Davis v. Schiappacossee, 155 So.2d 365 (Fla. 1963). *But see* Reed v. Black Caesar's Forge Gourmet Restaurant, Inc., 165 So.2d 787 (Fla. Dist. Ct. App. 1964) (court refused recovery to plaintiff for death of her husband resulting from liquor served him while he was intoxicated).

[36]413 Pa. 626, 198 A.2d 550 (1964).

[37]The court felt rather intensely about the duty owed society regarding the intoxicated driver. It said:

> An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the safety of the community as a stick of dynamite that must be defused in order to be rendered harmless. To serve an intoxicated person more liquor is to light the fuse. *Id.* at 631, 632, 198 A.2d at 55.

[38]Mitchell v. Ketner, 393 S.W.2d 755 (Tenn. Ct. App. 1964) *cert. den.*, Tenn. Sup. Ct., (1965). Although refusing to hold the defendant vendor liable on the facts of the case, the court stated:

> We are unwilling to hold that, no matter what the circumstances, the act of the purchaser and not the sale constitutes the proximate cause of the injury to third persons or that consumption of the intoxicant is always an independent, intervening act which breaks the chain of causation. . . . We can see little difference in principle between the act of an owner entrusting an automobile to one known to be an habitual drunkard and the act of a tavern keeper in plying the driver of a car with intoxicants knowing that he is likely to drive upon the public highway where he will become a menace to third persons. *Id.* at 759.

some forty feet to a rooftop.[39] In *Ramsey v. Anctil,*[40] the New Hampshire court held that one might maintain a common law cause of action for injuries resulting from being served additional liquor while intoxicated, by defendant liquor licensee in violation of statute. A New York court indicated its support of the minority rule in *Berkeley v. Park.*[41] It referred to the decisions of *Waynick*[42] and *Rappaport,*[43] and indicated its approval of the position allowing recovery stated in those cases.

In the 1966 case of *Soronen v. Olde Milford Inn,*[44] the New Jersey Supreme Court reaffirmed its *Rappaport* decision. The court held that a complaint stated a cause of action where it alleged a fatal fall in a tavern, which fall was allegedly proximately caused by patron's having been served liquor by defendant while patron was already in an "apparent and actual" state of intoxication. The Indiana court in *Elder v. Fisher,*[45] indicated its approval of the minority rule in permitting a cause of action in favor of a third party injured as a result of the sale of intoxicating liquor to a minor. Massachusetts recently permitted recovery in *Adamiam v. Three Sons, Inc.,*[46] where the defendant had illegally sold liquor to a person obviously intoxicated. Discussing proximate cause, the court concluded: "Henceforth in this Commonwealth waste of human life due to drunken driving on the highways will not be left outside the scope of the foreseeable risk created by the sale of liquor to an already intoxicated individual."[47] And finally, by a decision in federal district court, Montana has joined the growing number of jurisdictions that permit a common law recovery against a liquor vendor whose negligent act of furnishing intoxicating liquor to a patron has proximately caused injury to a third person.[48]

IV. *DEEDS* DISCUSSED

The courts which deny a remedy against the liquor vendor, usually do so on either the theory that the vendor was not negligent, or that the sale was not the proximate cause of plaintiff's injuries. In holding for the plaintiff, Judge Jameson found both that defendant was negligent, and

[39]Majors v. Brodhead Hotel, Inc., 416 Pa. 265, 205 A.2d 873 (1965).

[40]106 N.H. 375, 211 A.2d 900 (1965). Plaintiff had become highly intoxicated and was oblivious to a glass on the counter which he shattered with his hand, severing a nerve.

[41]47 Misc.2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965). Although New York has a Dram Shop Act, N.Y. GEN. OBLIGATIONS LAW § 11-101, the complaint prayed for damages both under the Dram Shop Act and common law.

[42]269 F.2d 322 (7th Cir. 1959), *cert. den.* 362 U.S. 903 (1960).

[43]31 N.J. 188, 156 A.2d 1, 75 A.L.R.2d 821.

[44]46 N.J. 582, 218 A.2d 630 (1966).

[45]247 Ind. 598, 217 N.E.2d 847 (1966). Defendant sold liquor to a minor in violation of statute. The minor became intoxicated, and negligently drove an automobile resulting in an accident injuring plaintiff's ward.

[46]Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968).

[47]*Id.* at 233 N.E.2d 20.

[48]Deeds, *supra* note 1.

that its sale was the proximate cause of the plaintiff's injuries. Both findings are supportable in terms of Montana precedent, and general tort theory.

By statute[49] Montana prohibits the sale or furnishing of intoxicating liquor, beer, or wine to a minor or any intoxicated person. The defendant in *Deeds* concedes that Tanberg was served intoxicating liquor by its agents and the court found that at the time of the serving Tanberg was both a minor and had been drinking to excess. The defendant's bartender agents were well aware[50] of both of these facts. Having found the statute violated, the court found the violation to be negligence per se.[51] This was a proper finding[52] in that the statute in question was "enacted by the legislature for the protection, health, welfare and safety of the people of the state."[53]

A more difficult problem was posed by the question of whether the defendant's sale was the proximate cause of the plaintiff's injuries. What is or is not proximate cause turns "upon conclusions in terms of legal policy, so that this becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[54] That is, as applied to the facts of the *Deeds* case, should the defendant who made unlawful sales

[49]R.C.M.1947 § 4-413. It reads in pertinent part:

> No licensee or his or her employee or employees, nor any other person, shall sell, deliver, or give away or cause or permit to be sold, delivered or given away any liquor, beer or wine to:
>
> 1. Any person under the age of twenty-one (21) years.
> 2. Any intoxicated person or any person actually, apparently or obviously intoxicated.

[50]Deeds at 353. Intent on the part of the vendor-violator is irrelevant to determine whether there has been a culpable breach of the law under § 4-413. In *State v. Erlandson*, 126 Mont. 316, 322, 249 P.2d 794, 797 (1952), the court said:

> The acts [Montana Beer Act and the Montana Retail Liquor License Act] are police regulations enacted pursuant to the police power of the state. . . . The acts and deeds therein condemned and prohibited [i.e., the sale of intoxicating liquor to minors or intoxicated persons] are *mala prohibita* as distinguished from acts *mala in se*. As to act *mala in se* the intent governs but as to those *mala prohibita* the only inquiry is: Has the law been violated?

[51]Deeds at 359.

[52]Daly v. Swift & Co., 90 Mont. 52, 300 P. 265 (1931); Burns v. Fisher, 132 Mont. 26, 313 P.2d 1044, 67 A.L.R.2d 1 (1957); Williams v. Maley, 150 Mont. 261, 434 P.2d 398 (1967). For additional citations, *see Deeds* at 359.

[53]R.C.M.1947 § 4-401. Prosser puts it well:

> Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence. . . . [T]he unexcused violation is negligence "per se." PROSSER, HANDBOOK ON THE LAW OF TORTS, § 35 at 202 (3d ed. 1964).

The plaintiff in this case was within the class of persons protected, *i.e.*, a "person of Montana;" and it requires no stretch of imagination to interpret the statute (in light of the extensive use made of automobiles today, and their frequent negligent operation by intoxicated persons resulting in serious injury) as designed to protect against the type of harm that befell the plaintiff, *i.e.*, personal injury resulting from an automobile accident.

[54]PROSSER, HANDBOOK ON THE LAW OF TORTS, § 49 at 282 (3d ed. 1964).

of intoxicating liquor to an intoxicated minor, be held liable as a policy of law to a third person who was injured by the intoxicated minor? The answer, it would seem, is clearly yes. But like most discussions of liability hinged on a determination of proximate cause, the decision in *Deeds* was not simply arrived at. Rather the court pursued a lengthy discussion of tort principles to arrive at the same answer, i.e., that defendant would be liable.

For there to be proximate cause, there must be cause in fact. There is a necessity of a causal relationship between the act complained of and the injury. Cause in fact is a *sine qua non* of proximate cause. Furthermore, the injury must flow from the act complained of in a natural continuous sequence. As stated by the Montana Supreme Court: "Proximate cause is one 'which in a natural and continuous sequence, unbroken by any new, independent cause, produced the injury, and without which the injury would not have occurred.'"[55] However, the proximate cause need not be the sole cause, and rarely if ever would it be. There are frequently intervening causes.

> [T]he test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable, the liability continues.[56]

Thus, though there intervene other causes, if those intervening causes were reasonably foreseeable, the defendant's liability will not be superseded or terminated. Applying these rules to the facts of *Deeds,* the court held that defendant could reasonably foresee that the intoxicated vendee might negligently drive his automobile injuring someone.[57] And when those eventualities in fact occurred, defendant was liable for the injuries sustained by plaintiff.

The next hurdle the court had to surmount was that the California Supreme Court on similar facts, had construed the sale of liquor in violation of an identical statute not to grant a cause of action—for lack of

[55]Stzaba v. Great Northern Railway Co., 147 Mont. 185, 195, 411 P.2d 379, 385 (1966).
[56]Mize v. Rocky Mountain Bell Telephone Co., 38 Mont. 521, 532, 100 P. 971, 973 (1909).
[57]Deeds at 361. The radar base at which the defendant's agents unlawfully served Tanberg [the driver of the automobile in which plaintiff was riding at the time of her injuries] was 39 miles from Havre. The Air Force personnel bartenders knew that the only available transportation back to Havre for the plaintiff and the numerour other civilians attending the party at the radar base, was private automobiles. Judge Jameson stated:

> . . . [I]n my opinion the employees of the United States who sold and served the liquor to an intoxicated minor, knowing that it would be necessary for the airmen at the party to return their dates to Havre by private automobile, could reasonably foresee or anticipate some accident or injury as a reasonable and natural consequence of their illegal and negligent acts, particularly in view of the ever increasing incidence of serious automobile accidents resulting from drunken driving. *Id.*

proximate cause—against the liquor vendor.[58] The court recognized that although the California court's construction was persuasive, it declined to follow California on the basis that the California decision was inconsistent with modern tort theory and Montana law regarding proximate cause.[59]

Perhaps the most assailable portion of the *Deeds* opinion is Judge Jameson's discussion of, and conclusion regarding, a 1961 Montana case, *Nevin v. Carlasco*.[60] The *Nevin* case raises a problem, because it cites with apparent approval, *Fleckner v. Dionne*,[61] a California case enunciating the rule denying a cause of action against the liquor vendor. To find in favor of the plaintiff in *Deeds*, Judge Jameson had to circumvent the implication that Montana would follow the majority rule.

In the *Nevin* case, the Montana Supreme Court affirmed a judgment of non-suit against a patron-plaintiff injured in a fall caused by a push from a fellow patron. Patron had sued the tavern keeper apparently on the theory that a tavern keeper owes a duty to protect his patrons. The Court discussed at some length a tavern keeper's general duty to patrons,[62] and then concluded that this general duty had not been breached.

The Supreme Court then turned to a discussion of plaintiff's reliance on two Montana statutes, which plaintiff alleged created a duty on the part of the tavern keeper. The Court said: "If we were to accept this

[58]The rule in California is well established that it is not the sale but rather the consumption of the intoxicating liquor which is the proximate cause of injury. Lammers v. Pacific Electric R. Co., 186 Cal. 379, 199 P. 523, 525 (1921); Hitson v. Dwyer, 61 Cal. App.2d 803, 143 P.2d 952, 955 (1943); Fleckner v. Dionne, 94 Cal. App.2d 246, 210 P.2d 530, 534 (1949); Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450, 459, 54 A.L.R.2d 1137 (1955).

[59]Deeds at 359-61. Whereas the rule of proximate cause in California in situations like the one at bar is well settled—it is the consumption not the sale which is the proximate cause—as applied to this fact situation the rule of proximate cause had not been decided in Montana. Judge Jameson concluded that in the absence of any controlling authority by the Montana court, the sale of the liquor in violation of the law was a proximate cause of plaintiff's injuries. Deeds at 361.

[60]Nevin v. Carlasco, 139 Mont. 512, 365 P.2d 637 (1961). Judge Jameson's consideration of *Nevin* is found at page 360 of his opinion. Deeds at 360.

[61]94 Cal. App.2d 246, 210 P.2d 530 (1949).

[62]139 Mont. 512, 514, 515, 365 P.2d 637, 638 (1961). In discussing the duty of a tavern keeper to his patron, the court stated:

> [W]e find the general rule to be that the duty of a tavern keeper to protect a patron from injury by another arises only when one or more of the following circumstances exist:
>
> (1) A tavern keeper allowed a person on the premises who has a known propensity for fighting.
>
> (2) The tavern keeper allowed a person to remain on the premises whose conduct had become obstreperous and aggressive to such a degree the tavern keeper knew or ought to have known he endangered others.
>
> (3) The tavern keeper had been warned of danger from an obstreperous patron and failed to take suitable measures for the protection of others.
>
> (4) The tavern keeper failed to stop a fight as soon as possible after it started.
>
> (5) The tavern keeper failed to provide a staff adequate to police the premises.
>
> (6) The tavern keeper tolerated disorderly conditions.
>
> None of these duties were violated here. *Id.* at 514, 515, 365 P.2d at 638.

contention [that the statutes created a duty] the evidence is devoid of any knowledge on the part of [the tavern keeper] of the violation of any of these statutes.''[63] Then going on to confuse the holding, the Court states:

> The rule followed by most courts is that when damages arise from voluntary intoxication, the seller of the intoxicant is not liable in tort for the reason that his act is not the efficient cause of the damage. The proximate cause is the act of him who imbibes the liquor.
> The appellant was obliged to prove a set of circumstances which created a duty to the injured patron and facts that would prove a breach of that duty. [Citing *Fleckner.*] Having failed to do so the judgment of the district court was correct and it is hereby affirmed.[64]

The *Nevin* case presents a problem of interpretation. Just what did the Montana Supreme Court do? The case is sufficiently confused to render its operative effect subject to at least three plausible interpretations. 1. The Montana Court intended to adopt the majority rule denying recovery and did so. 2. The Montana Court merely recognized the majority rule, but indicated that in certain circumstances a common law cause of action will lie. 3. Regardless of the intent of the Montana Court, the *Nevin* case has no precedental value regarding a common law cause of action against a liquor vendor who unlawfully dispenses intoxicants.

The first proposition, a rule denying a cause of action against the vendor for the unlawful sale of intoxicants, follows from the fact that the Montana Court cited with apparent approval the California case of *Fleckner v. Dionne,* which case denies a cause of action for lack of proximate cause.[65] It is this proposition which caused Judge Jameson the

[63] *Id.* at 515, 365 P.2d at 639.
[64] *Id.* at 515, 516, 365 P.2d at 639.
[65] The argument that the Supreme Court intended to adopt the majority rule as stated by *Fleckner,* goes like this: It is true that the question before the *Nevin* Court was one of duty [not proximate cause, which was the issue in *Fleckner*], the duty owing by a tavern keeper to a patron. This duty arises, if at all, by virtue of the fact that the plaintiff is a patron. It inures, in the proper circumstances [see the Court's enumeration, listed in note 62, *supra*] to a patron whether or not the tavern keeper has unlawfully sold intoxicants to another patron. It is a duty to patrons only, and it is similar in nature, though not as extensive in scope, to the duty owed by a common carrier to a passenger. The breach of this duty results not from an unlawful sale of intoxicants, but from a failure to protect a patron from injury at the hands of a fellow patron, whom the tavern keeper knows or should know to be unruly.

The Supreme Court concluded that on the facts alleged in the *Nevin* case, this ''patron duty'' did not exist, although it admitted that in a different set of circumstances such a duty might be found. But to determine whether the defective complaint might be sustained on any basis, the Court turned its attention to another theory upon which plaintiff might have stated a cause of action. That theory is the one discussed in *Fleckner, i.e.,* whether the vendor is liable to a third party at common law for the unlawful sale of intoxicants to a patron who because of his intoxication, injures the third person. On the basis of *Fleckner,* the Court concluded that no such theory was sustainable at common law.

Hence, since the plaintiff in *Nevin* failed to prove a ''patron duty,'' and since she could not sustain a cause of action on the theory of the *Fleckner* case, she was non-suited.

Viewing the *Nevin* decision in this way, notwithstanding the fact that the question in *Nevin* was one of duty and not proximate cause, the Court's reference to *Fleckner* was more than mere dictum. It was a basis of the holding and is binding precedent.

difficulty, for if this view were adopted, he would have been precluded from finding a cause of action in the *Deeds* case.

Judge Jameson, however, interpreted the Court to have adopted the second proposition. He quoted the language from *Nevin* set out above as text accompanying footnote 64, and then concluded:

> The reference to **Fleckner v. Dionne,** *supra,* might indicate that Montana would follow California in holding that the furnishing of liquor was not the proximate cause of plaintiff's injury. On the other hand, the court indicates also that there might be a "set of circumstances" which would create a duty to an injured person. The Montana court did not of course consider the question here presented or the cases permitting recovery, most of which have been decided since 1961.[66]

Apparently Judge Jameson's reasoning is that although the Montana Court has adopted the majority rule denying recovery against the liquor vendor, that adoption was qualified. He interpreted the Montana Court to be saying that on the facts of *Nevin* there was no cause of action, nor is there usually in such cases as is expressed by *Fleckner,* but on certain facts [given the proper "set of circumstances"] there would be a cause of action. With that interpretation of *Nevin,* Judge Jameson goes on to conclude that the facts of *Deeds* fall within the exception created by the Montana Court.

It may be that the Judge is correct in his interpretation. However, it seems most reasonable that the Montana Court's reference to "set of circumstances" has nothing to do with proximate cause nor cause of action based on unlawful sale. The question before the Court in *Nevin* was one of duty, and the Court merely indicated that on certain facts a patron might prove a duty owed to himself as a patron.[67] Duty and proximate cause are not equivalents. Therefore, Judge Jameson's conclusion seems not to follow.[68] For in spite of the fact that the Montana Court might in given circumstances find a duty to an injured party, that would not permit it to sustain a cause of action against a vendor if in fact Montana "would follow California in holding that the furnishing of liquor was not the proximate cause of plaintiff's injuries."[69] The Court would have to find not only duty, but also proximate cause.

Notwithstanding the difficulty of the language in *Nevin,* there is a relatively simple basis for determining that the Montana Supreme Court has not precluded a common law cause of action as was done in *Deeds.* The very basis of the common law liability which is the subject of this Note, is an unlawful sale or some other wrongful furnishing. Yet in the

[66]Deeds at 360.
[67]For an explanation of this "patron duty," see note 65 *supra.*
[68]Note that the Montana Court stated that there might be a "set of circumstances which [would create] a *duty.*" Had the Court said there might be a "set of circumstances which [would create] a *proximate cause,*" then Judge Jameson's conclusion would be more defensible.
[69]See quoted material taken from Judge Jameson set out *supra* in text accompanying note 66.

Nevin case, the Montana Court stated that "there was no evidence adduced showing that the [defendant liquor vendor] had served . . . any intoxicating liquor"[70] to the patron who injured the plaintiff. In fact, plaintiff herself testified that she did not see the defendant tavern keeper serve liquor to the party who caused her injuries.[71] Since the necessary act of some wrongful sale or furnishing was not substantiated, the Court has said nothing which will serve as precedent in regard to a cause of action based on an unlawful sale of liquor. The question of tavern keepers' common law liability for an unlawful sale of intoxicants was not properly before the Montana Court. Hence, in the absence of Montana law on the subject, Judge Jameson was at liberty to adopt the minority rule permitting a common law cause of action. Furthermore, in light of policy, Montana law on proximate cause, and the trend toward allowing a remedy,[72] it seems a cogent argument might be made that when the Montana Court does consider the question, it will opt in favor of the minority rule.

Having once decided that there is a common law action in favor of the injured party against a vendor of intoxicating liquor who unlawfully sells or furnishes intoxicants to a patron who either injures himself or another, the question then remains as to what may constitute defenses. Of course if any element of those four[73] necessary to sustain a cause of action in negligence is not present, no cause of action can be maintained. In fact it would seem that any defense to an ordinary negligence tort action that would be good in another circumstance, would be good in an action of the type being discussed. But some courts have created an exception. They have declined to allow the defendant-vendor to avoid liability by pleading contributory negligence. For example, in *Soronen v. Olde Milford Inn,*[74] the court indicated that contributory negligence was not a defense to a suit for wrongful death following the deceased's fatal fall in a tavern which fall was the alleged result of deceased having been served liquor while he was then in an actual and apparent state of intoxication. Nor could defendant avoid liability on theory of contributory negligence where defendant's patron arrived sober and became intoxicated on the premises before falling some forty feet, where defendant violated a statute making it unlawful to sell or furnish intoxicating liquor to any person visibly intoxicated.[75] But a contrary approach was taken in *Ramsey v. Anctil.*[76] Contributory negligence was

[70]139 Mont. 512, 513, 365 P.2d 637 (1961).

[71]*Id.*

[72]*See supra,* III. THE TREND TOWARD AVAILABILITY OF REMEDY AGAINST VENDOR.

[73]Duty, negligence, proximate cause, and damages are the four elements that must be proven in every successful negligence action.

[74]46 N.J. 582, 218 A.2d 630 (1966).

[75]Majors v. Brodhead Hotel, Inc., 416 Pa. 265, 205 A.2d 873 (1965).

[76]106 N.H. 375, 211 A.2d 900 (1965).

held to be a defense to a common law action for injuries received as a result of being served additional liquor, while intoxicated, by the vendor.

The best that can be said is that there is a split of authority on this point. The question was not conclusively answered in *Deeds,* as the Court found that the plaintiff was not contributorily negligent, nor had she assumed the risk.[77]

V. CONCLUSION

Although the traditional common law rule is one denying the liability of a liquor vendor who unlawfully sells intoxicating liquor to a patron causing injury to the patron or a third person, recent cases have established a trend which permits a cause of action against the vendor. It is a favorable development.

Particularly in the situation as typified by the *Deeds* case, the traditional objection to a finding of liability—lack of proximate cause—is untenable. Today with the literally millions of private automobiles on our highways, and with the thousands of people killed every year by intoxicated operators, it is not at all unforeseeable that when a vendor plys a patron with liquor to the point of obvious intoxication, or where he furnishes a minor with intoxicants, that a serious automobile accident may ensue. To permit a cause of action on such facts is entirely consistent with recognized tort principles. It has the benefit of shifting the loss from an often entirely innocent third party to the liquor business. It provides a remedy where there otherwise may be none because the intoxicated driver may be judgment proof. Yet according such a remedy will not subject liquor vendors to ruinous liability because they have the power to prevent such liability. They need merely refrain from making sales to minors and intoxicated persons.

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[77] Deeds at 362.